



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 23, 1995

Mr. Richard D. Monroe
Deputy General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 E. 11th Street
Austin, Texas 78701-2483

OR95-1117

Dear Mr. Monroe:

On behalf of the Texas Department of Transportation (the "department"), you have requested that this office reconsider Open Records Letter No. 93-177 (1993). In that ruling, this office held that the bridge inspection reports in question were not confidential under section 409 of title 23 of the United States Code and therefore were not "information deemed confidential by law, either Constitutional, statutory, or by judicial decision" excepted from required public disclosure under former V.T.C.S. article 6252-17a, section 3(a)(1) of the Open Records Act now codified at section 552.101 of the Government Code.

In its request for reconsideration, the department contends that release of the bridge inspections under the Open Records Act would allow "[a]n attorney or private individual whose motivation was to gather evidence so as to fabricate a case against state or federal agencies . . . to procure evidence which absolutely could not be procured by discovery proceedings in a court of law. The protection afforded by 23 U.S.C. Sec. 409 would be lost." As we stated in Open Records Letter No. 93-177 (1993), the exception afforded by section 552.101 of the Government Code requires that a governmental body have *specific* authority under state or federal law to make information confidential. Attorney General Opinion JM-830 (1987); *see also* Open Records Decision No. 478 (1987) at 2 ("statutory confidentiality protected by section [552.101] requires express language making certain information confidential"). This office will not imply a confidentiality requirement from the structure of a statute. Open Records Decision No. 465 (1987). Section 409 provides that information gathered pursuant to sections 130, 144, and 152 of title 23 of the United States Code "*shall not be* subject to discovery or *admitted into evidence in a Federal or State court proceeding* or considered for

other purposes in any action for damages arising from any occurrence at a location mentioned or addressed" in the information. 23 U.S.C. § 409 (Emphasis added). Section 409 does not provide that such information is *confidential* or that it *may not be disclosed*. Moreover, section 552.101 of the Government Code does not cover discovery privileges. See Open Records Decision No. 575 (1990). Because section 409 does not expressly prohibit the release of this information, we decline to revisit our prior ruling.

You appear concerned that our ruling will "lead to a flood of 'discovery' masquerading as Open Records requests for information which...is exempt from discovery...." We note that where requested information relates to pending or reasonably anticipated litigation to which the department is a party, it may be exempt from public disclosure under section 552.103 Government Code. It may also be exempted by other provisions of the Government Code. See, e.g., Gov't Code § 552.111; see also Open Records Decision No. 615 (1993).

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo", with a stylized flourish at the end.

Kay H. Guajardo
Assistant Attorney General
Open Records Division

KHG/LBC/rho

Ref.: ID# 20068

cc: Mr. Bo Crossen
Rt. 4, Box 580
Gainesville, Texas 76240